

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matter of |) | |
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| Applications by Qwest Communications, |) | |
| International, Inc., <i>et al.</i> |) | WC Docket No. 02-314 |
| For Authorization to Provide In-Region, |) | |
| InterLATA Services in Colorado, Idaho, |) | |
| Iowa, Montana, Nebraska, North Dakota, |) | |
| Utah, Washington and Wyoming |) | |
| |) | |

**COMMENTS OF
Level 3 Communications, LLC**

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International, Inc., *et al.*) WC Docket No. 02-314
For Authorization to Provide In-Region,)
InterLATA Services in Colorado, Idaho,)
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Level 3 Communications, LLC (Level 3) submits these comments in opposition to the long distance applications submitted by Qwest Communications, International, Inc. (Qwest). In this proceeding, Qwest seeks authorization from the Federal Communications Commission (FCC or Commission) to offer in-region, interLATA services pursuant to section 271. Qwest's application is deficient because it fails to provide interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1). The FCC's interconnection rules establish that each party bears financial responsibility for its facilities on its side of the point of interconnection (POI). Nevertheless, Qwest requires Level 3 to pay Qwest for the interconnection facilities that transport Qwest originated traffic to Level 3 for termination.

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LEC for traffic (or facilities) that originates on the first LEC's network.¹ Qwest fails to comply with this rule by requiring that "Internet Related" traffic originated by Qwest end-users not be counted when determining the relative use factor of the facilities carrying that traffic. That is important because, as explained in detail below, the relative use factor shifts to Level 3 the ultimate financial responsibility for the facilities on Qwest's side of the point of interconnection (POI) in violation of Commission rules established pursuant to sections 251(c)(2) and 252(d)(1).

The Commission must not give Qwest an illegal competitive advantage by allowing it to offer in-region interLATA services while it ignores the Commission's well established rules of interconnection. Before granting Qwest's 271 applications, the Commission must require Qwest to remedy the specific violation of the competitive checklist as discussed herein.²

¹ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶209 (1996) (*Local Competition Order*); see also *TSR Wireless, LLC et al. V. US West Communications, Inc. et. al*, File Nos. E-98-13, E-98-15, E-98-17, E-98-18, Memorandum Opinion and Order at ¶34 (rel. June 21, 2000) (*TSR Wireless Order*).

² Although the issues are not state specific, Level 3's comments address issues raised by Qwest's 271 applications in Colorado, Nebraska, Utah, and Washington. In 2001, Level 3 and Qwest arbitrated a number of issues in interconnection arbitrations in Arizona, Colorado and Oregon. Qwest's attempt to exclude Internet related traffic from its "relative use rule" in the contracts was an issue that was arbitrated in each proceeding. The Arizona Corporation Commission issued a decision in favor of Level 3 while the Colorado Public Utilities Commission and the Public Utility Commission of Oregon found in favor of Qwest on the issue of the proper application of the relative use principle. Level 3 has appealed the decisions of the Oregon and Colorado commissions to federal district court. The sole issue on appeal is relative use. The parties have filed motions and cross-motions for summary judgment in both proceedings. Level 3 is also now engaged in interconnection arbitration proceedings with Qwest in Minnesota, Washington, New Mexico, Utah and Nebraska all involving the sole issue of the proper application of the relative use principle. Level 3 and Qwest completed the first arbitration hearing in Minnesota on October 10, 2002 and will be conducting hearings in the remaining states in the following weeks.

II. Qwest's Fails to Show Compliance with Competitive Checklist Item (i) – Interconnection in Accordance with the Requirements of Sections 251(c)(2) and 252(d)(2)

A. The FCC's Interconnection "Rules of the Road" Require Carriers to Pay for Interconnection Facilities Used to Bring Their Customers' Calls to the Point Of Interconnection with Another Carrier's Network

Under the 1996 Act, each carrier has different cost responsibilities for the facilities carrying a call depending on whether the carrier is originating or terminating the call. The first set of rules concern the originating carrier's obligation to carry the call to the point of interconnection between the two carriers' networks. FCC Rule 51.703(b) provides the general principle:

A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.³

Thus, Qwest is operationally responsible for routing the call from the Qwest customer to the point of interconnection between Qwest and Level 3 and must absorb all costs associated with this part of the call. FCC Rule 51.709(b) more specifically allocates responsibility to pay for dedicated facilities interconnecting the two carriers' networks:

The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network.⁴

According to the Commission's established principles, each party pays for a percentage of the costs of the facilities interconnecting their networks, depending on the percentage of traffic originating on their own networks.

³ 47 CFR § 51.703(b).

⁴ 47 CFR § 51.709.

In addition, as part of its interconnection rules and obligations, the FCC has established “rules of the road” that provide unequivocally that each carrier is responsible for the costs associated with delivering its own local service customers’ originating calls to the POI between its network and the network of the carrier serving the party called. As stated in the Commission’s *TSR Wireless Order*:

In essence, the originating carrier holds itself out as being capable of transmitting a telephone call to any end user, and is responsible for paying the cost of delivering the call to the network of the co-carrier who will then terminate the call. Under the Commission’s regulations, the cost of the facilities used to deliver this traffic is the originating carrier’s responsibility, because these facilities are part of the originating carrier’s network. The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls. This regime represents “rules of the road” under which all carriers operate, and which make it possible for one company’s customer to call any other customer even if that customer is served by another telephone company.⁵

B. Qwest Misapplies The Concept of Relative Use As Set Out In The FCC’s Rules

Although Level 3 and Qwest have agreed upon a single POI per LATA and that the POI should be the physical and financial demarcation point as required by the Commission’s interconnection rules, Level 3 is not attempting to require Qwest to strictly apply this principle. In fact, while the FCC’s rules and orders establish that each party should bear financial responsibility for its facilities on its side of the POI alone, Level 3 has compromised on this point by agreeing that the parties’ financial responsibilities for two-way direct trunk transport and entrance facilities will be determined by the “relative use” of interconnection trunks and transport for originating traffic. This “relative use” factor is intended to account for the fact that a carrier’s end-users’ originating traffic initially travels on its facilities to the POI, and therefore it will agree to pay a proportionate share of the cost of that facility that

⁵ *TSR Wireless Order*, at 11186, para. 34.

carries its originating traffic. So while the negotiated solution is not a strict application of the rule that says the POI establishes both the physical and financial demarcation point between carriers, it does still allow for a single POI per LATA and is consistent with the FCC's interconnection rules and obligations, in that it is agreed that the party responsible for carrying the originating traffic will bear the financial burden of delivering that traffic on its own network to the other carrier for termination.

Qwest seems to accept the Commission's interconnection rules as they apply generally. However, in arbitration proceedings in Colorado, Nebraska, Utah, and Washington, Qwest maintains that the general rules should not apply to locally dialed calls placed by Qwest customers that are bound for ISPs served by Level 3.⁶ Qwest argues that this departure is mandated because in its *ISP Remand Order*,⁷ the FCC referred to ISP traffic as "interstate" for jurisdictional purposes and found that the FCC rules regarding reciprocal compensation for transport and termination of traffic should not apply. In other words, Qwest is saying that – even though it acknowledges and agrees that Internet Related traffic will go over the facilities in question – Internet Related traffic originated by Qwest's end-users and terminated by Level 3 should not count as originating traffic when determining Qwest's relative use of facilities on the Qwest side of the POI. Ignoring this traffic is contrary to FCC rules which dictate that a LEC may not assess charges on another LEC for traffic (or facilities) that originates on the first LEC's network.⁸ Charging for these facilities raises the

⁶ See Attachment A, Interconnection Agreement Between Qwest and Level 3, sections 7.3.1.1.3 and 7.3.11.3.1 (disputed sections).

⁷ See *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9157, FCC 01-131, CC Docket Nos. 96-98, 99-68 (rel. April 27, 2001) ("*ISP Remand Order*").

⁸ 47 C.F.R. § 51.703(b). See *Local Competition Order*, 11 FCC Rcd 15499, ¶209; see also *TSR Wireless Order*, at ¶34.

possibility of Qwest's double recovery of its costs and compels Level 3 to take responsibility for traffic originated by Qwest customers going over the Qwest network.

Level 3's concern is Qwest's selective application of the relative use principle. Specifically, Qwest seeks to include in the Interconnection Agreement language that would expressly exclude "Internet Related" traffic – calls placed by Qwest customers to Internet Service Providers ("ISPs") served by Level 3 – from the relative use calculation. An example of how the relative use factor would work is helpful in considering Level 3's concern. If Qwest were originating 75% of the traffic going over a Direct Trunk Transport ("DTT") facility on the Qwest network, Level 3 would only be responsible for 25% of the charge for DTT. However, Qwest has said that if any of the traffic it is originating is "Internet Related," those minutes will not count in determining relative use of the DTT facility. Thus, if the traffic is "Internet Related," even though 75% of the minutes going over the facility are originated by Qwest customers, Level 3 could bear 100% of the cost of that facility because of Qwest's arbitrary rule.

So, while appearing to allow Level 3 interconnection at a single POI per LATA and appearing to apply the principle of relative use, Qwest undercuts both of these vital requirements by carving out ISP-bound traffic from this treatment. More importantly, by doing this Qwest effectively skirts the clear intent of the Act and the FCC's interconnection rules. Even though Qwest attempts to establish a convoluted legal basis for its position, there is no legal justification for not counting Internet Related traffic in the relative use calculations.⁹ There is also no debate that ISP-bound traffic travels over Qwest's local facilities in the same manner as other local calls placed by Qwest customers do. Qwest

simply doesn't want to bear the cost of originating these calls placed by its customers. The end result of adopting Qwest's position would be that the more calls Qwest customers place to ISPs served by Level 3, the more cost that Level 3 would bear for Qwest's originating traffic. Further, all of that additional cost for Qwest originating facilities would be borne by Level 3 without the right to receive any corresponding compensation from Qwest for terminating those ISP-bound calls because bill and keep intercarrier compensation is required in most Qwest states.

In unilaterally choosing to treat ISP-bound traffic in a manner different from voice traffic for purposes of interconnection obligations, Qwest discriminates against Level 3 and other providers of ISP-bound traffic in favor of voice providers and its own ISP service.

C. The ISP Remand Order Governs Only Reciprocal Compensation for Transport and Termination of Traffic and Does Not Alter Carrier's Interconnection Obligations.

What Qwest fails to note is that in the *ISP Remand Order* itself, the FCC explicitly stated that its findings regarding reciprocal compensation do not alter carriers' interconnection obligations. Although the FCC asserted jurisdiction over intercarrier compensation for the termination of ISP-bound traffic in the *ISP Remand Order*, it did not alter other regulatory obligations of the originating LEC, including specifically the obligation to carry traffic to a single point of interconnection. In Footnote 149 of the *ISP Remand Order*, the FCC made clear that its invocation of its jurisdiction to set rates with respect to what an originating carrier pays a terminating carrier to terminate an ISP-bound call should not be read to alter the other responsibilities of an originating carrier. Most specifically, the FCC expressly provided that it was not altering the responsibility of Qwest or any other originating carrier to carry its

⁹ See Attachment B, Plaintiff's Response to Cross-Motions for Summary Judgment, Level 3 Communications, LLC v. Public Utilities Commission of Colorado, Civil Action No. 01-N-2455 (CBS)

originating traffic to the point of interconnection between the originating carrier and the terminating carrier (e.g., Level 3). Thus, those rules regarding Qwest's interconnection obligations and the obligation to carry traffic to the POI without charging for origination remain intact.

Second, even if interconnection facilities used to handle the origination of ISP-bound traffic were to be considered "intercarrier compensation" subject to the *ISP Remand Order*, the FCC's additional statement, made in the context of explaining the relationship of intercarrier compensation for ISP-bound traffic to intercarrier compensation that the FCC regarded to be under § 251(b)(5), cannot be ignored. The FCC expressly stated, "we . . . are unwilling to take any action that results in the establishment of separate intercarrier compensation rates, terms and conditions for local voice and ISP-bound traffic."¹⁰

By imposing this interconnection obligation on Level 3 in violation of the FCC's interconnection rules, Qwest does not distinguish between the rules governing allocation of costs for facilities used in taking the call to the POI between the carriers' networks—the interconnection obligation—and the rules governing allocation of costs for the exchange of traffic going over those facilities—the transport and termination obligations. The *ISP Remand Order* does not alter Qwest's obligation to bring its customers' traffic to the POI between its and Level 3's networks. Qwest's failure to adhere to these obligations is in direct violation of the Commission's interconnection rules of the road and competitive checklist item (i).

Finally, it is also worth noting that the Arizona public utility commission has correctly analyzed this issue. The Arizona commission held that ISP-bound traffic between Level 3

(United States District Court for the District of Colorado).

and Qwest was to be included in the relative use calculation for the purpose of determining responsibility for payment for direct trunk transport and entrance facilities between the Qwest and Level 3 networks. Highlighting the specific difference between interconnection and intercarrier compensation, the Arizona commission stated:

The issue of relative use of facilities on Qwest's side of the POI is distinct from the issue of whether Internet traffic is local and subject to reciprocal compensation. Qwest's reliance on FCC rules and orders concerning reciprocal compensation for local traffic is misplaced. Because this is a distinct issue from reciprocal compensation, we do not believe that employing the same compromise for switching costs and reciprocal compensation is appropriate. We, therefore, find that ISP traffic should be included in the calculation of relative use of interconnection facilities on Qwest's side of the POI.¹¹

That state commission correctly declined to apply the reasoning of the *ISP Remand Order* to the parties' interconnection obligations and instead followed FCC regulations in applying the relative use principle.

III. Conclusion

For the reasons stated herein, the Commission should find that Qwest's arbitration position in Colorado, Nebraska, Utah, and Washington violates the Commission's interconnection rules and obligations.¹² The FCC should affirm that sending "Internet Related" traffic across trunks and facilities constitutes "use" of those trunks and facilities such that the carrier originating the traffic should bear its relative share of responsibility for those

¹⁰ *ISP Remand Order*, at 9194, ¶ 90

¹¹ Opinion and Order, *In the Matter of the Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 253(b) of the Communications Act of 1934, As Amended by the Telecommunications Act of 1996, With Qwest Corporation Regarding Rules, Terms and Conditions for Interconnection*, Dkt. Nos. T-03654A-00-0882 and T-01051-B-00-0882, Decision No. 63550 at 10 (Ariz. Corp. Com., April 10, 2001).

¹² See *supra* footnote 2 detailing the interconnection negotiations and arbitrations between Qwest and Level 3 in certain of Qwest's in-region states.

trunks and facilities. Accordingly the Commission should require Qwest to remedy this violation before the FCC grants the applications of Qwest for authority to provide in-region, interaLATA services in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming.

Respectfully Submitted,

S/ [filed electronically]

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